United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/907
20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 907

Case No. 993: SALVIA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Julio Barboza;

Whereas, on 20 November 1997, Elena Salvia, a former staff member of the United Nations Economic Commission for Latin America and the Caribbean (hereinafter referred to as ECLAC), filed an application requesting the Tribunal:

"A. To find that the Respondent's amendment of the 200 Series Staff Rules was made to avoid the payment of termination indemnity.

B. To find that in accordance with Article 101, paragraph 1 of the Charter and General Assembly resolutions 37/126, Section IV, paragraph 5, and 38/232, Section VI, paragraph 5, her fixed-term contract on long term status should be considered as an indefinite appointment or as a fixed-term appointment expiring at her age of retirement.

C. Should pleas [A and B] above not be accepted, to find that the Appellant had a reasonable expectancy for the renewal of her fixed-term appointment for at least two additional years.

...

E. To order the Respondent to pay an indemnity equivalent to two years of salary, based on the long period of continuous good services rendered to the Organization and the reasonable expectancy of contract renewal.

...

G. To order that the Respondent pay the Applicant an additional compensation equivalent to three months of her net salary, for delays in the consideration of her case."

Whereas the Respondent filed his answer on 25 June 1998;

Whereas the Applicant filed written observations on 25 August 1998;

Whereas, on 11 November 1998, the Tribunal put questions to the Applicant, to which she responded on 14 November 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 April 1975, on a two-month fixed-term appointment at the GS-5 level, under the 100 Series of the Staff Rules, as a Statistical Clerk with the Economic Commission for Latin America and the Caribbean (ECLAC), at its Buenos Aires Office. Her appointment was successively extended, and on 1 April 1976, the Applicant was promoted to the G-6 level, as Research Assistant. On 1 April 1981, she was promoted to the G-7 level, and her functional title was changed to Senior Research Assistant. On 1 May 1985, the Applicant was assigned to a 200 Series project as Expert at the L-2 level, although she maintained her 100 Series fixed-term appointment. On 1 January 1987, the Applicant was granted a long-term appointment under the 200 Series of the Staff Rules, as an Expert at the L-2 level. Thereafter, her contract was successively extended to 30 June 1995, when she was separated from service upon the expiration of her appointment.

In July 1993, the Applicant was assigned the functions of Chief of Administration, ECLAC, Buenos Aires Office, in addition to her regular functions in the computer area.

On 2 March 1994, the Director of ECLAC, Buenos Aires, wrote to the Applicant, informing her that due to budgetary difficulties in the ECLAC Buenos Aires Office, institutional reorganization would be necessary. As a result, certain "thematic" areas including the computer area, where the Applicant worked, would be eliminated. He noted that during two meetings he had had with the Applicant, one towards the end of January 1994, and another on 1 March 1994, he had offered her the position of Chief of Administration, ECLAC, Buenos Aires Office but that she had "emphatically" rejected the offer. He informed the Applicant that, under the circumstances, he would not request renewal of her contract, which was due to expire on 31 March 1994.

On 8 March 1994, the Director of ECLAC, Buenos Aires, announced to all ECLAC Buenos Aires staff members that another staff member had been asked to assume the coordination of the administrative functions of the Office.

On 11 March 1994, the Applicant wrote to the Director of ECLAC, Buenos Aires, stating: "I accept the offer to take up the post of Chief of Administration in the ECLAC, Buenos Aires Office." In a reply dated 14 March 1994, the Director of ECLAC, Buenos Aires, pointed out that the position of Chief of Administration had been assigned to another staff member, that this decision had been communicated to all personnel on 8 March 1994, and that the position had already been offered to and categorically rejected by the Applicant.

On 17 March 1994, the Director of ECLAC, Buenos Aires, informed the Applicant that her contract, due to expire on 31 March 1994, would be extended through 30 June 1994. He advised that, henceforth, her work would exclusively involve computer work. Subsequently, ECLAC successively renewed the Applicant's appointment through 30 June 1995.

On 17 May 1995, the Director of ECLAC, Buenos Aires, informed the Applicant that, based on the recommendations of the "Joint Advisory Group" concerning the financial and staffing situation of the Buenos Aires Office, it had been decided to discontinue the

computer functions performed by the Applicant, with effect from 1 July 1995. The Applicant was advised, therefore, that her contract would be renewed only through 30 June 1995.

On 1 June 1995, the Applicant requested the Executive Secretary, ECLAC, Santiago, to review the administrative decision not to renew her contract. In a reply dated 23 June 1995, the Executive Secretary, ECLAC, Santiago, informed the Applicant that, for purely financial reasons, ECLAC was unable to renew her contract beyond 30 June 1995.

On 5 July 1995, the Applicant requested the Secretary-General to review the administrative decision not to renew her appointment beyond 30 June 1995. The Applicant also requested the Secretary-General's agreement to submit her case directly to the Administrative Tribunal if the decision that she was contesting were to be maintained.

On 10 August 1995, the Chief, Administrative Review Unit, informed the Applicant that her request for review had been received at that office on 8 August 1998, and that if she did not receive an answer from the Secretary-General within two months, she could file an appeal with the Joint Appeals Board (JAB) within the following month.

On 8 November 1995, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 27 August 1997. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 50. ... [T]he Panel unanimously agreed that the Appellant should have claimed, under the General Assembly resolution 37/126, section IV, para. 5 and General Assembly resolution 38/232, section VI, para. 5, the right to a reasonable consideration for a career appointment following five years of continuous service with the Organization, before now.
>
> 51. The Panel unanimously determined as frivolous, the contention of the Appellant that she was not properly informed of the possibilities of obtaining a professional post via the G to P competitive examinations.

52. The Panel unanimously agreed that except for the mere allegations of the Appellant, there is no rational basis for the statement that staff rule 204.3(b) was abolished to avoid the payment of termination indemnity to the Appellant.

53. The Panel unanimously agreed that the Appellant had a legitimate expectation of continued employment with the Organization, and unanimously recommends, in view of this finding, that the Appellant be compensated and paid the equivalent of nine months of her net base salary.

54. The Panel unanimously agreed that there was unreasonable delay in processing the Appellant's appeal for which the Respondent is to blame, and unanimously recommends, in view [of] this finding, that the Appellant be compensated and paid the equivalent of an additional three months of her net base salary.

55. The Panel unanimously decided to make no further recommendation in support of the appeal."

Not having received the Secretary-General's decision on the JAB's recommendations, on 20 November 1997, the Applicant filed with the Tribunal the application referred to earlier.

On 18 December 1997, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has decided to accept the Board's conclusions that you could not base any right to a reasonable consideration for career appointment on General Assembly resolutions 37/126 and 38/232; that your contention that you were not properly informed of the possibilities of obtaining a professional post via the G to P examination was frivolous; and that there was no rational basis for your statement that staff rule 204.3(b) was abolished to avoid the payment of termination indemnity to you.

The Secretary-General, however, is unable to accept the Board's conclusion that you had a legitimate expectation of continued employment with the Organization since he does not share the Board's reasoning which led to this conclusion. The fact that you were assigned the functions of Chief of Administration in June 1993 and were offered the post itself in January and on

1 March 1994 clearly demonstrated the good faith of the Administration in terms of designating you *on those specific functions,* if you accepted the offer. It was obviously the Administration's prerogative, at a time of budgetary difficulties, to decide which functions had to be maintained and which had to be discontinued and the offer was made to you within that framework. Given the fact the Administration had demonstrated its good will and good faith, as mentioned before, to assign you to *the administrative functions*, it would be unreasonable to suggest that the Director capriciously interpreted your response on 1 March 1994 to be a negative one and that he, again capriciously, wrote so in a memo to you the next day. It is clear that you could not have a legitimate expectancy to continue on functions you would have preferred instead of functions you had been offered. Even if there was any confusion as to what was meant in the information circular of 8 March 1994 by the phrase 'coordination of the administrative functions' the fact that on the same day you were asked to hand over the administrative tasks you had been carrying out to the other staff member who had been designated by the Director, dispels any doubt (...). Thus your acceptance of the post of Chief of Administration on 11 March 1994 was moot and does not constitute a basis of a legitimate expectancy of renewal of appointment either. In conclusion, there were no circumstances created by actions of the Administration which may have created such a legitimate expectancy of renewal.

The Secretary-General does not agree with the Board's conclusion that the Respondent was to blame for an 'unreasonable delay' in processing your appeal. As Respondent had explained, Respondent's office was actively engaged in obtaining all the information necessary to complete Respondent's reply and thus the delay was not unconscionable.

For the above-mentioned reasons, the Secretary-General has decided not to accept the Board's recommendations for compensation and has consequently decided to take no further action in your case.

..."

Whereas the Applicant's principal contentions are:

1. The Respondent amended the 200 Series of the Staff Rules in order to avoid paying termination indemnities, in violation of Article 101, paragraph 1 of the Charter and General Assembly resolution 37/126, Section IV, paragraph 5.

2. The Applicant had a reasonable expectation of renewal of her contract.

3. The Applicant should be compensated for the dilatory manner in which the Respondent handled her appeal.

Whereas the Respondent's principal contentions are:

1. The Applicant was on a fixed-term appointment under the 200 Series of the Staff Rules, which expires on the date stated in the letter of appointment. Longstanding service by itself does not create any expectancy of renewal.

2. Appointments under the 200 Series of the Staff Rules are by their very nature limited both in scope and duration.

3. A series of successive fixed-term appointments does not by itself create a legal expectancy of renewal.

4. Actions or statements made by the Administration did not constitute a commitment on the part of the Organization.

5. Although the Respondent concedes that the handling of the Applicant's appeal did not conform with the time-limit stated by staff rule 111.2(g), compensation of one month net base salary would be adequate.

6. The Applicant's claim that the Respondent amended the 200 Series of the staff rules to avoid paying a termination indemnity has no rational basis.

The Tribunal, having deliberated from 9 to 20 November 1998, now pronounces the following judgement:

I. The Applicant held an appointment under the 200 Series of the staff rules. After a series of renewed contracts, her post was abolished. Even if the post had not been abolished, the Applicant could sustain no expectations of renewal of her last contract, since

the relationship between the Organization and a staff member ceases at the expiration of such an appointment. The Applicant had been warned that the computer area would eventually be eliminated and that her contract would not be renewed after 30 June 1995.

II. The Tribunal considers that that was the end of the relationship regarding the 200 Series post, and that no compensation is due in that respect. The Tribunal has repeatedly held that no legal expectancy of continued employment is created by efficient or even outstanding performance (cf. Judgement No.700, Benthin (1995)), or by a series of successive appointments (cf. Judgement No. 422, Sawney (1988)).

III. However, the Applicant had been given functions of Chief of Administration together with her 200 Series post. That overlapping of functions extended between July 1993 and the appointment of a new Chief of Administration on 8 March 1994, i.e., approximately eight months. Moreover, she had been offered that post in the context of a restructuring of the office contemplated by the Director, ECLAC/Buenos Aires (the "Director"). The Tribunal believes that in that respect, the Applicant had a legitimate expectancy of a post, but not of retaining her post under the 200 Series.

IV. In order to better understand the facts of the case and their legal implications, the Tribunal shall examine the period between the meeting that the Director and the Applicant had during the last week of January 1994 and the appointment of another staff member as Chief of Administration on 8 March of the same year.

V. The evidence before the Tribunal regarding the aforementioned period consisted of: (1) a letter from the Director to the Applicant, dated 2 March 1994; (2) a memorandum dated 8 March 1994, announcing that another staff member had been asked to take charge of the coordination of the administrative tasks of the office; (3) a memorandum of

11 March 1994, from the Applicant to the Director, stating that she accepted the offered post of Chief of Administration, ECLAC/Buenos Aires office; (4) a memorandum from the Director to the Applicant, dated 14 March 1994, rejecting the terms of the Applicant's 11 March 1994 memorandum; and (5) a memorandum from the Director to the Applicant of 17 March 1994.

VI. In response to questions put by the Tribunal, the Applicant provided a letter dated 8 March 1994, that she wrote to the Director. This letter was immediately transmitted by the Tribunal to the Respondent and, in the absence of a challenge by the latter, has been accepted by the Tribunal as valid evidence. This letter is important and sheds light on the meaning of the Director's and the Applicant's conduct in that critical period between late January and 8 March 1994.

VII. According to the record, the Director and the Applicant held a meeting during the last week of January, during which the Director told the Applicant that he intended to restructure the office. In his scheme, the Applicant was offered the post of Chief of Administration, the functions of which she had been assuming for several months. She was thus asked to abandon her work in her post in the computer area, the post that she occupied under her 200 Series appointment. The Director and the Applicant agreed to revisit these issues, which remained unresolved, after the vacation period.

VIII. On 1 March 1994, a second meeting took place. The Applicant and the Respondent have set forth different versions of what transpired during that meeting. The Respondent's version, embodied in the Director's letter of 2 March, is that the Applicant emphatically manifested her rejection of the administrative tasks and her preference to continue her professional work in the computer field. Finally, the letter says that, in that last analysis ("en definitiva", in Spanish), she had neither accepted the post of Chief of

Administration nor considered it reasonable to continue working both in the computer and administrative fields without any additional financial benefit. The Organization, the Director added, was in no condition to grant such additional benefit to her.

IX. The Applicant, on the other hand, maintains in her application that she "accepted the proposal, but strongly suggested the merger of the computer area with that of administration, requesting also a change in her functional title to reflect the new responsibilities of the post." The Applicant continues, "The Director interpreted this suggestion as a negative answer from the Appellant to accept the post as Chief of Administration, and also interpreted the proposal of the functional title change as a request for a salary increase, in the own words of the Director. The Appellant emphatically rejects that interpretation and declares that such was not her intention."

X. According to the Director, the matter was closed in the 1 March meeting when the Applicant rejected the post of Chief of Administration, whereas in the Applicant's version, the offer was still open.

XI. Be that as it may, the letter of 8 March from the Applicant to the Director, recently introduced by the Applicant, made clear to the Director that her understanding was different from his. The Applicant maintains that this letter was received by the Director before he issued his circular assigning the coordination of the administrative job of the office to another staff member, and that the circular was issued as a result of the Applicant's letter.

XII. Such being the case, the Tribunal finds that the Respondent should have reopened negotiations. The Applicant's letter of 11 March, simply accepting the post of Chief of

Administration, also sheds light on the real intention of the Applicant, which was to continue her relationship with the Organization.

XIII. The fact that the Respondent abruptly ended the discussions, in an effort to impose his own interpretation of the Applicant's reaction to the offer, implies a total lack of consideration for the Applicant and an attempt to evade the Administration's responsibility towards her. It was obvious that she had a legitimate expectancy to obtain a post for the tasks that she was entirely capable of performing, as shown by the fact that after six months of work in that post, she was offered the position.

XIV. The Applicant accuses the Respondent of having handled the appeal that she submitted to the JAB "in the most casual and dilatory way". In effect, 24 months elapsed before the JAB finally gave its recommendation to the Administration. The Administration asked for an extension of the time-limit to reply to the appeal, after that time-limit had expired. The Applicant complains that she was not given the report of the JAB, which had been sent to the Secretary-General on 27 August 1997, until 24 October 1997. She asserts that such delay inflicted "unnecessary anxiety and grievance on the Applicant". The Applicant requests an indemnity of three months salary. The Respondent acknowledges that "[a]t the time when the representative of the Secretary-General requested an extension, the period within which the reply should have been filed had already expired". He submits that "the handling of the matter was late, but not negligent or dilatory" and suggests that the Applicant be paid compensation "proportionate to what has been awarded in other cases". The Respondent asserts that one month's salary should fulfil such condition.

XV. The Tribunal considers that because of the frustrated expectancy provoked in the Applicant by the Administration and in view of the abrupt and inconsiderate manner in which she was treated, she should be paid the equivalent of 18 months of her net base

salary, as compensation. In addition, the Applicant should be paid an equivalent of three months net base salary, for the Respondent's handling of her appeal before the JAB, which caused her unnecessary anxiety and grief.

XVI. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To pay the Applicant the amount of 18 months net base salary at the rate in effect on the date of her separation; and

(b) To pay to the Applicant the additional amount of three months net base salary, at the rate in effect on the date of her separation, for the delays of the Respondent in the handling of her appeal.

XVII. The Tribunal rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Julio BARBOZA
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary